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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROGER ARSENAULT,

Petitioner

v.

ALLEGHENY AIRLINES, INC.

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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FOR THE FIRST CIRCUIT

QUESTION PRESENTED FOR REVIEW

Whether the grant of Respondent's motion for summary judgment was appropriate in this defamation action where said motion was rendered primarily on the basis of affidavits submitted by agents and employees of the Respondent whose motive, intent and state of mind were at issue, thus raising a material question of fact as to the credibility of those affiants and thereby transforming summary judgment into a mere trial by affidavit.

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ROGER ARSENAULT, your Petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on December 24, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts appears at Appendix A, infra, pp. 11. The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court in an opinion which appears at Appendix B, infra, pp. 12.

JURISDICTION

The order and judgment of the United States Court of Appeals for the First Circuit were entered on December 24, 1980. See Appendix B, p. 12, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Roger Arsenault, hereinafter referred to as Petitioner, was first employed by Allegheny Airlines, Inc., hereinafter referred to as Respondent, in 1967 and worked there continuously until the time of his termination in 1976. During the period of

his employment, he maintained an excellent work record but for one transgression. As a result of this transgression, Petitioner was transferred from his usual job assignment and placed on probationary status, which allowed Respondent to terminate him for any infraction of company policy or conduct rules.

In early August of 1976, Respondent instituted an investigation concerning alleged thefts by certain customer service agents working inside the terminal at the ticket counter. During this time, Petitioner's duties were that of a ramp agent and took place mainly outside the terminal area. Some time thereafter, Petitioner was advised that the investigation focused primarily on one Michael Marinelli. The record reveals that Arsenault was not an associate of Marinelli and had very infrequent contact with him. Petitioner was advised to stay clear of the investigation on account of his probationary status. It is undisputed that a short while thereafter, Petitioner came into contact with Marinelli and advised him, "If you are doing anything, you had better stop it."

In August of 1976, Marinelli was terminated from Respondent for his involvement in the alleged misappropriation of company funds

and shortly thereafter was charged with larceny. On October 5, 1976, Marinelli was acquitted of the aforementioned charge.

During this same period, and prior to Marinelli's acquittal, Petitioner was terminated on account of his alleged aiding and abetting in the misappropriation of company funds. It is undisputed, however, that Respondent had no reason to suspect Petitioner of any complicity in the said misappropriation.

Subsequent to Marinelli's acquittal and his reinstatement to employment of Respondent, Petitioner, through counsel, demanded to be reinstated and requested that Respondent retract the defamatory statements that were contained in his letter of termination. Respondent refused to reinstate Petitioner or retract its defamatory statements claiming that Petitioner had "interfered with an investigation."

On December 2, 1976, Petitioner commenced an action in the United States District Court, District of Massachusetts. The complaint alleged that Petitioner was damaged on account of the publication of a libelous letter terminating his employment, which letter was maliciously, recklessly, negligently, and excessively published by Respondent.

Petitioner's complaint further alleges that there was publication by Respondent of defamatory matter by means of a libelous communication by Respondent to the Massachusetts Department of Employment Security. The complaint demanded that Petitioner be awarded damages insofar as the alleged defamatory statements by Respondent caused him to suffer injury to his reputation and good standing in the community, all as set forth in his complaint.

Respondent answered Petitioner's complaint denying the material allegations contained therin and set forth several affirmative defenses including truth, privilege and estoppel. Both parties engaged in extensive discovery including depositions, interrogatories and request for production of documents.

On November 1, 1979, Respondent filed a motion for summary judgment, which was supported by affidavits and a memorandum of law. On January 14, 1980, Petitioner filed a motion opposing Respondent's, which was also supported by a memorandum of law.

On March 17, 1980, a memorandum and order were entered by the Court below ordering judgment for Respondent. On April 11, 1980,

Petitioner filed his Notice of Appeal to the United States Court of Appeals for the First Circuit requesting that the judgment entered on March 17, 1980, be reversed.

On December 24, 1980, the United States Court of Appeals for the First Circuit entered judgment affirming the judgment of the District Court thereby dismissing Petitioner's complaint.

ARGUMENT

The decisions below conflict directly with this Court's holding in Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944).

In Sartor, the defendant moved for summary judgment and in support of its motion, submitted affidavits which were prepared by officers of the defendant corporation and certain experts, all of whom were directly interested in the subject matter of the litigation. In reviewing the court below, this Court stated that although

> the weight of the evidence would be found in a trial to be with defendant...the court may not withdraw these witnesses from cross-examination, the best method devised for testing trustworthiness of testimony and their credibility. And the weight to be given to their opinions is to be determined, after trial, in the regular manner.

Sartor v Arkansas Natural Gas Corp., 321 U.S. 620, 628-29, (1943).

The interest of the moving party, i.e., the affiants, in the success of the litigation raises a serious question as to their credibility, thus making summary judgment particularly inappropriate. As this Court noted in Sonnetheil v. Christian Moerlein Brewing Co., 172 U.S. 401 (1899), the mere fact that the witness (affiant) is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.

This particular case presents a situation analagous to that in Sartor in that the affidavits submitted by defendant were prepared by persons all directly interested in the outcome of the litigation. Of greater significance, however, is the fact that in ruling on defendant's motion for summary judgment, the court was asked to decide an issue that dealt with the motive, intent and state of mind of the affiants. In this context, "great circumspection is required" and summary judgment should be used sparingly. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962). Maiorana v. McDonald, 596 F.2d 1072, 1076-77 (1st Cir. 1979). Gual Morales v. Hernandez

Vega, 579 F.2d 677, 680-81 (1st Cir. 1978) quoting Hahn v. Sargeant, F.2d 461 (1st Cir. 1975).

In deciding the appropriateness of summary judgment, the determinative issue was whether the Respondent had abused its conditional privilege by malicious, unreasonable, or excessive publication. In resolving this issue, the District Court relied primarily on affidavits submitted by persons whose very judgment in terminating the Petitioner was called into question.

At this juncture, it should be noted that the District Court found that the termination letter was capable of a defamatory meaning and there was ample publication of the same. The only impediment precluding the defeat of Respondent's motion was Petitioner's inability to overcome Respondent's affirmative defense of conditional privilege. With regard to this determinative issue, the District Court found Respondent to be within the scope if its privilege because "Allegheny had reason to believe that Arsenault deliberately acted to further a criminal act at the time the letter was prepared and published." (App. A, infra, p. 12).

In its attempt to ascertain what defendant's reasonable belief was at the time of the

as the District Court did in this instance. Empire Electronics Co. v. United States, 311 F.2d 175, 179-80 (1st Cir. 1962).

"The advantage of trial before a live jury with live witnesses and all the possibilities of considering the outcome factors, should not be eliminated by substituting trial by affidavits and the sterile bareness of summary judgment." Adickes v. S.H. Kress & Co., 398 U.S. 144, 176 (1970).

Although the plaintiff had the opportunity to cross-examine one affiant at a prior deposition and therefore to a certain extent was able to explore his credibility, this issue was still not brought before a trier of fact as it rightly should have been.

> This is not the kind of case that can be settled on summary judgment. It is peculiarly the kind of case where the triers of fact whose business it is not only to hear what men say but to search for and find the roots from which sayings spring, should be afforded full opportunity to determine the truth and integrity of the case.

Loudermilk v. Fidelity and Casualty Company of New York, 199 F.2d 561, 565-66 (5th Cir. 1962).

For purposes of summary judgment, a court must consider that a jury would be entitled, after affiant's testimony on direct examination and cross-examination, to disbelieve explanations and motives. See Gual Morales v. Hernandez Vega, 579 F.2d 677, 681 (1st Cir. 1978).

publication of the termination letter, the District Court based its decision on affidavits submitted by persons who were responsible for the actual termination. See Thyssen Plastik Anger KG v. Induplas, Inc., 579 F.2d 400 (1st Cir. 1978).

Submitted along with Respondent's motion for summary judgment, were the affidavits of Raymond Garcia, director of personnel services for Respondent; and Frank Zuzel, customer service manager at Logan International Airport, Boston, Massachusetts.

Mr. Garcia was the official of the Respondent who actually drafted the termination letter while Mr. Zuzel made the decision to terminate the Petitioner and communicated the same to Garcia. In both affidavits, the affiants affirmed their honest and reasonable beliefs in :1) accusing the Petitioner of aiding and abetting in the commission of a crime; and 2) terminating the Petitioner on the basis of their beliefs. The court below accepted their affidavits as true and therefore resolved the issue of the affiants' credibility, despite opposition from the Petitioner. See Consolidated Edison Electric Company v. United States for Use and Benefit of Gough Industries, Inc., 355 F.2d 437, 438-39 (9th Cir. 1966).

It is clear that when the credibility of the affiants came into question, the motion should have been denied and the issue resolved by the appropriate trier of fact where he would have had the opportunity to observe the demeanor of the witnesses (affiants). 6 Moore's Federal Practice P 56.15, at 514 (2d ed. 1980).

"It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which has so long been the hallmark for even handed justice." Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962).

In this particular matter, the Court has not had the opportunity to observe the demeanor of the affiants since the court ruled on defendant's motion without a hearing. See Paiton and Company v. Bourns, Inc., 442 F.2d 216, (2d Cir. 1961). Where the ultimate issue involves what the honest belief of Respondent was at the time the termination letter was prepared and published, it is incumbent that the trier of fact observe the Respondent's demeanor and evaluate credibility. A Judge should not, when ruling on a motion for summary judgment, draw fact inferences, especially as to credibility,

In this case, however, plaintiff's right to have crucial factual issues decided by a jury did not materialize and summary judgment has transformed this right into a mere trial by affidavit. See Redman v. Warrener, 576 F.2d 766 (1st Cir. 1975).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the for the First Circuit.

Respectfully submitted,

March 23, 1981

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APPENDIX A

Here is set forth, the opinion rendered in the United States District Court for the District of Massachusetts and the judgment entered by the said Court.

OPINION

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROGER ARSENAULT,
Plaintiff

v.

Civil Action
No. 76-4275-MA

ALLEGHENY AIRLINES, INC.,
Defendant

MEMORANDUM AND ORDER

Mazzone, D.J. March 17, 1980

The plaintiff brought this defamation action claiming that his former employer, Allegheny Airlines, Inc. (Allegheny), published an employment termination letter which contained false and defamatory remarks and resulted in injury to the plaintiff's reputation. Allegheny has moved for summary judgment, claiming that the publication was privileged and that the plaintiff has failed to prove actual malice so as to overcome

Allegheny's conditional privilege. The plaintiff has filed an opposition to this motion with supporting memorandum. The record, including the pleadings, depositions and affidavits, presents the following factual setting.

The plaintiff, Roger Arsenault (Arsenault), was first employed by Allegheny in December, 1967. During the course of his employment, Arsenault was assigned to work at Boston's Logan International Airport and held positions in Allegheny's customer service department. He was first employed as a ramp agent, then as a lost and found agent and, just prior to his termination, again as a ramp agent. During a portion of Arsenault's employment with Allegheny, he was supervised by Frank E. Zuzel, customer service manager for Allegheny's Boston operation.

On January 17, 1976, Arsenault and a female companion flew to San Juan Puerto Rico aboard an Eastern Airlines aircraft using reduced fare passes issued by Allegheny. Having received a representation from Arsenault that he would be traveling with his wife, Allegheny issued these passes to Arsenault and his wife. While in Puerto Rico, Arsenault took advantage of hotel discounts available to airline employees traveling on employee passes.

The use of Allegheny's reduced fare passes and associated discounts is limited to employees of the airline and their immediate families. Upon Arsenault's return to Boston from Puerto Rico, Allegheny personnel discovered (and Arsenault subsequently admitted) that he had not traveled on these flights and shared these hotel rooms with his wife. The woman traveling with him was a security officer at Logan International Airport. Arsenault's actions, therefore, violated Allegheny policy regarding the use of this privilege.

During Arsenault's employment with Allegheny, the airline maintained a set of rules entitled "Personnel Policy Guide" (Policy Guide) which outlined the terms and conditions of employment, the grounds for discharge, grounds for disciplinary action, and outlined a multi-step employee grievance procedure. Arsenault's employment was governed by the Policy Guide. The portion of the Policy Guide relating to misuse of airline pass privileges stated that improper use of these privileges would be cause for suspension of the employee's privilege or immediate termination.

After completing the investigation of this matter, Zuzel met with Arsenault. During this meeting, Zuzel advised Arsenault that, unless

he resigned, Allegheny would terminate him. On January 29, 1976, Arsenault resigned.

Following his resignation, Arsenault filed a grievance of his termination pursuant to Allegheny's multi-step grievance procedure. On March 5, 1976, G. Donald Hansbury, Allegheny's vice president for customer services, ordered Arsenault reinstated effective March 8, 1976. Arsenault's termination was, however, conditioned on his acceptance of a Step 4 probationary term for a period of eighteen months. [1/] Arsenault accepted the terms of his reinstatement. Accordingly, he was reinstated and began work as a ramp agent.

During the summer of 1976 Allegheny's security department began an investigation into misappropriation of company money by airline ticket agents at Allegheny's Logan International Airport operation. During the course of this investigation, Zuzel was informed by Fred Santarpio, a ticket agent, that another ticket agent, Michael Marinelli, may have been involved in stealing funds from cash sales of one-way

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1. Allegheny's management manual provided that any infraction of a company rule by an employee on Step 4 during the designated probationary term would result in immediate termination of that worker.

airline tickets at the Allegheny ticket counter. Later, on August 12, 1976, Robert Day, Allegheny's chief customer service agent, told Zuzel that Michael Curry, a service agent, informed him that Marinelli had asked him to participate in the theft of cash from one-way ticket sales and a theft of a camera from the lost and found department.

In a meeting between Robert Day, Joseph E. Rice, and Allegheny security officer, and Zuzel told Day that Marinelli was under investigation for the theft of funds from one-way cash ticket sales from the Allegheny ticket counter at Logan International Airport. At some point, Day was instructed that the matters discussed were confidential and should not be repeated to anyone other than the participants.

Allegheny security officers and representatives of the Massachusetts State Police planned a "decoy operation" to be executed on Sunday, August 15, 1976. As part of this plan certain plain-clothed Massachusetts State police were instructed to purchase one-way airline tickets from Marinelli at the Allegheny counter by delivering cash to him. The plan was carried out but nothing resulted which would have implicated Marinelli in a theft.

Prior to the execution of the "decoy opera-

tion", Michael Curry told Zuzel that Marinelli had confronted him and told him that he knew that Curry told Allegheny officials of the alleged thefts at the ticket counter and of Marinelli's alleged participation. Curry reported that Marinelli threatened him with bodily harm and possible legal action if he continued to make representations of this nature to the Allegheny authorities.

At the conclusion of the "decoy operation", Allegheny security officials received information which confirmed Curry's representation that Marinelli knew that he was the target of this probe. On August 17, 1976, Allegheny security personnel questioned Marinelli. During this interview, Marinelli told the officers that Arsenault told him that he was the subject of an investigation and that Curry was the source of information concerning his alleged participation. Marinelli also stated that Arsenault had indentified Day as the source of Arsenault's information concerning the probe.

On August 18, 1976, Zuzel and other Allegheny officials interviewed Arsenault. Arsenault told them that his friend, Day, telephoned him and told him the details of the investigation into alleged thefts of money by Marinelli. Arsenault told him that Day called him because Day wanted Arsenault, who was still a probationary worker,

to avoid trouble. Day told Arsenault to keep their discussion secret. Arsenault also told the investigators that shortly after he spoke to Day, he called Marinelli and told Marinelli that he was the subject of an investigation concerning misappropriation of money from the Allegheny ticket counter. Arsenault also told Marinelli all of the details concerning the probe which were known to him at that time, including the names of sources of information. At the conclusion of this interview, Arsenault signed a statement which summarized his answers to questions.

On August 19, 1976 Marinelli was arrested by state police and charged with a larceny offense concerning property belonging to Allegheny. The following day, he was discharged by Allegheny.[2/]

2. Marinelli was charged with stealing $49.00 from Allegheny Airlines in the East Boston District Court. After trial, a court found Marinelli to be not guilty of that offense. He was acquitted on October 5, 1976. Marinelli was thereafter reinstated to his job with Allegheny.

Arsenault was, again, on August 23, 1976, interviewed by Zuzel. During this interview, Day was present. The discussion revealed that Arsenault told Marinelli that Curry was the source of information about Marinelli's alleged thefts from the ticket counter. Once again, Arsenault signed a statement to that effect.

During the course of this investigation, Zuzel, on several occasions, conferred with his supervisors, Matt Sorts, regional director of ground services, and Raymond Gracia, director of ground services. Sorts and Garcia were based at Allegheny's customer services headquarters in Pittsburgh, Pennsylvania. Garcia, in turn, reported developments in the course of this investigation to his superior, G. Donald Hansbury.

Because of Arsenault's interference in the investigation, Zuzel decided to terminate his employment. In accordance with Allegheny's management manual, Zuzel discussed his decision to terminate Arsenault with Sorts and Garcia.[3/]

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3. Step V of the Allegheny management manual dated June 25, 1976 outlined a procedure which Allegheny management personnel must follow before discharging an employee. It stated in pertinent part: "The manager discusses the entire case with his/her Regional Director or the Director-Ground Services. Subject to the agreement of the manager, Regional Director, and Director-Ground Services, the employee is terminated."

Sorts and Garcia agreed with Zuzel's position. Zuzel then talked with Garcia about the appropriate grounds for termination and they discussed the company policy guide. They concluded that the following portion of the guide, dated July 5, 1976, was the appropriate basis upon which to terminate Arsenault:

> Misappropriation, or attempted misappropriation of company funds, pilferage of company material, or theft of property or funds belonging to:
>
> --Allegheny,
> --another employee,
> passengers and shippers,
>
> as well as aiding and abetting another employee's violation of this provision, will result in the offending employee's termination.

On August 25, 1976, Garcia drafted a termination letter addressed to Arsenault. Garcia gave this draft to his secretary, Agnes Pusateri. Agnes Pusateri then dictated the terms of Garcia's draft to Linda Gayron, Zuzel's secretary. Linda Gayron typed the termination letter. Zuzel reviewed the letter, signed it and directed that it be mailed to Arsenault. Arsenault received the letter, which provided:

> "Dear Mr. Arsenault:
>
> An investigation by our Security Department and our Customer Service Department pertaining to the aiding and imbeding (sic) of another employee in the misappropriation of company

> funds has now been completed.
>
> In accordance with Allegheny's Personnel Policy Guide, section 4-40, page 4, you are hereby terminated from the company.
>
> As soon as articles issued to you by Allegheny are returned, your final paycheck will be released by all Departments of Allegheny and mailed to your home. Your final paycheck must include all loans with the Credit Union before it is released to you. Any vacation time still owed to you will be payed in this check.
>
> If you feel you have been given unfair treatment, you may pursue the matter through the Grievance Procedure. A copy of this Procedure is attached for your convenience."

In accordance with Allegheny policy, Zuzel attacned a copy of the termination letter to Allegheny's "Terminaion and Leave Form, PE-22", sent a copy to Garcia, and sent copies to Allegheny's personnel, accounts receivable, payroll, budget, tax departments and credit union. Upon receipt of his copy, Garcia made additional copies and forwarded them to Sorts and Hansbury. Neither Garcia or Hansbury transmitted the letter to any other person.[4/]

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4. The record makes it clear that other Allegheny workers knew the reasons for Arsenault's termination. None, however, except Arsenault, persons Arsenault showed the letter to, Garcia, Sorts, Hansbury, Zuzel, and their secretaries, actually read (or had read to to them) the letter. The record is not clear on the means by which this information was communicated to other Allegheny workers.

Following his termination, Arsenault sought unemployment compensation benefits from the Massachusetts Division of Employment Security (DES). The DES asked Allegheny to describe the circumstances which gave rise to Arsenault's discharge. Allegheny responded and told DES that Arsenault "aided another employee in the misappropriation of company funds". The DES denied Arsenault's claim for benefits.

In deciding whether summary judgment is appropriate in this case, we are guided by Fed. R.Civ.P. 56 and the principles outlined in Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), cert. denied 425 U.S. 904 (1976). We must determine whether the defendant, as moving party, has demonstrated that there is "no genuine issue as to any material fact". Fed.R.Civ.P. 56(c). Accordingly we view the record "in the light most favorable to...the party opposing the motion". Hahn v. Sargent, supra at 464 (quoting Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962), and "indulge all inferences favorable to the party opposing the motion." Hahn v. Sargent, supra at 464, citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

This Court initially notes that summary procedures should be used sparingly where motive, intent or state of mind are at issue, Poller v.

Columbia Broadcasting System, 368 U.S. 464, 473 (1962); Maiorana v. MacDonald, 596 F.2d 1072, 1076-77 (1st Cir. 1979), and that "great circumspection is required" in such cases if the party opposing the motion provides the court with "some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim". Hahn v. Sargent, supra at 468.

In this diversity action, we look to the law of Massachusetts governing the tort of defamation. It is well-established that a publication is defamatory if it tends to injure one's reputation in the community and exposes that person to hatred, ridicule and contempt. Brauer v. The Globe Newspaper Co., 351 Mass. 53, 55-56 (1966); Mabardi v. Boston Herald-Traveler Corp., 347 Mass. 411, 413 (1964); Anthony v. Barass, 346 Mass. 401, 402 (1963); Muchnick v. Post Publishing Co., 332 Mass. 304, 305-06 (1955). The test is "whether, in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community." Mabardi v. Boston Herald-Traveler Corp., supra at 413 (quoting Muchnick v. Post Publishing Co., supra at 305-06). A statement which expressly states or insinuates that the plaintiff is a criminal or participated in a criminal act is

defamatory in proper circumstances. Ezekiel v. Jones Motor Co., Inc., 372 N.E. 2d 1281, 1287 (Mass. 1978); Mabardi v. Boston Herald-Traveler Corp., supra at 413; see, Liquori v. The Republican Co., 1979 Mass. App. Adv. Sh. 2263.

In this case, Allegheny's statement regarding the plaintiff's participation in a scheme to misappropriate company funds is the type of assertion which would discredit Arsenault and expose him to hatred, ridicule and contempt in the minds of a considerable and respectable class of people. The quality of the statement is such that, if read, it would be understood by a person of ordinary intelligence, Thayer v. Worcester Post Co., 284 Mass. 160, 162 (1933), who understands the English language, see, Economopoulos v. A.G. Pollard Co., 218 Mass. 294, 297 (1914) (defamatory remark made in Greek not published to one who did not understand the Greek language), to mean that Arsenault participated in a criminal act and is, therefore, a criminal. Thus, in the absence of any privilege or defense which might be available to Allegheny, we conclude that the statements in the termination letter are capable of a defamatory

meaning.[5/]

The tort of libel requires that there be some publication of the defamatory remark. There can be no publication if libelous words are communicated to the plaintiff alone. Economopoulos v. A.G. Pollard Co., supra at 297; Hedgepeth v. Coleman, 111 S.E. 517, 519 (N.C. 1922); Miller v. Butler, 60 Mass. (6 Cush.) 71, 74 (1850). A libelous remark is published if (1) the defendant (or his agent) prepares, composes and writes the remark; (2) hands or causes the writing to be delivered to some third person; and (3) the thiir person reads and understands the contents (or the defendant reads the writing to some third person who listens and understands). Hedgepeth v. Coleman supra at 519; see, Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 349 (1943).

In this matter, Garcia drafted the letter and gave a copy of the draft to his secretary, Agnes Pusateri. Agnes Pusateri then read and dictated the draft to Linda Gayron, Zuzel's secretary, over the telephone. Linda Gayron

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5. Agency principles require that a corporation be held liable in damages when a libelous remark is made by one of its agents in the course of their employment. Comerford v. West End Street Railway Co., 164 Mass. 13, 13-14 (1895).

transcribed what Ms. Pusateri dictated. Linda Gayron gave the letter to Zuzel, who read the letter, signed it and returned it to Ms. Gayron. Ms. Gayron then photocopied the letter and sent copies to Arsenault, Garcia and various Allegheny departments. The letter was then, presumably, read by other Allegheny workers. Massachusetts has expressly rejected the proposition that there can be no publication of an intra-corporate communication, i.e., a writing between and among officers and agents of the same corporation in reference to the corporations's business. Bander v. Metropolitan Life Ins. Co., supra at 348-49. We must conclude, therefore, that there was a publication of the letter when it was distributed among the Allegheny workers and otherwise communicated to persons other than Roger Arsenault.

The next consideration is whether the statements were privileged. We look first to the letter to the DES authorities. The plaintiff claims that Allegheny's transmittal of a copy of his termination letter, or similar publication, constituted a defamatory publication. Massachusetts General Laws Chapter 151A, section 46, provides in part:

> All information transmitted to the director (of DES) or his duly authorized representative pursuant to

> this chapter shall be absolutely privileged and shall not be made the subject matter or basis in any action of slander or libel in any court of the commonwealth.

The record establishes that Arsenault applied for unemployment benefits under M.G.L. c. 151A after Allegheny discharged him. Pursuant to an information questionnaire submitted to Allegheny concerning Arsenault's application, Allegheny submitted information concerning Arsenault's discharge to the DES officials. Allegheny's response was, in substance, a re-publication of the termination letter. This response may not, however, be the basis of an action for defamation under Massachusetts law. M.G.L. c. 151A 546.

As to the other copies of the termination letter, the general rule in defamation actions involving an employer's remarks about an employee's work record is that such comments are conditionally privileged and are actionable only upon proof of actual malice. Molinar v. Western Electric Company, 525 F.2d 521, 532 (1st Cir. 1975), cert. denied 424 U.S. 978 (1976) (applying Massachusetts law). Where the occasion is a privileged one, the defendant must prevail unless the plaintiff proves that the defendant published the remark

maliciously, Burns v. Barry, 353 Mass. 115, 119 (1967); Shore v. Retailers Commercial Agency, Inc., 342 Mass. 515, 520 (1961); Galvin v. The New York, New Haven and Hartford, 341 Mass. 293, 297 (1960); Childs v. Erhard, 226 Mass. 454, 456 (1917), or recklessly. Ezekiel v. Jones Motor Co., Inc., supra at 1287; Hutchinson v. New England Telephone & Telegraph, 350 Mass. 189, 191-92 (1966). The plaintiff bears the burden of proving that the defendant acted maliciously in order to extinguish the defendant's privilege. Sheehan v. Tobin, 326 Mass. 185, 191-92 (1940); Conner v. Standard Publishing Co., 183 Mass. 474, 480 (1903).

Where a defendant relies on a conditional privilege, the truth or falsehood of the allegedly defamatory remark is not material. Sheehan v. Tobin, supra at 190. Put another way, in the absence of proof of malice, recklessness or ill will, the defense of privilege will prevail even if the remark was in fact false. Doane v. Grew, 220 Mass. 171, 176 (1915). The publisher's lack of belief or lack of reasonable grounds for belief in the truth of the defamatory matter may, in the proper circumstances, constitute malice and, accordingly, extinguish the privilege. Sheehan v. Tobin, supra at 192, citing STATEMENT OF TORTS

§599, comment a.

In order to prove malice there must be some showing of "improper motive' or an "intent to abuse the occasion by referring to it as a pretense", of some evidence of recklessness, Ezekiel v. Jones Motor Co., Inc., supra at 1287. Unnecessary or unreasonable repetition of defamatory expressions may be considered malicious. Bander v. Metropolitan Life Ins. Co., supra at 344. The manner in which the defamatory commnt is communicated may, in some cases, be malicious. Bander v. Metropolitan Life Ins. Co., supra at 344. Finally, an absence of good faith by the publisher may be evidence of malice. Shore v. Retailer Commercial Agency, Inc., supra at 521.

In this case, the record demonstrates that Allegheny made a fairly comprehensive investigation into the thefts from its ticket counter at Logan International Airport. During the course of this investigation a suspect was identified and later interviewed. In the course of this interview Marinelli, the suspect, told Allegheny officals that Arsenault told him the details of the investigation into thefts at the Allegheny counter. Moreover, Arsenault, during an interview with the same Allegheny officials, admitted this disclosure to Marinelli and his suggestion to Marinelli that Marinelli alter his course if he was involved in any

activity that would violate Allegheny policy.

The Allegheny security officials viewed this disclosure by the plaintiff as an effort to thwart their inquiry. They therefore decided that Arsenault was "aiding and abetting" the misappropriation of funds.[6/]

Our review of the record indicates that the plaintiff has not demonstrated that the defendant, through its agents, acted maliciously in publishing the termination letter. There was ample evidence before the Allegheny personnel upon which to base a conclusion that the plaintiff was acting to thwart their investigation or, alternatively, to assist another in escaping responsibility for his action. Indeed, the plaintiff, by his own admission, provided the Allegheny authorities with suggicient evidence for this conclusion.

The fact that Arsenault's alleged principal, Marinelli, was acquitted of a larceny

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6. Strictly speaking, the plaintiff's acts, as revealed in the record, probably would not be sufficient to constitute and aiding or abetting or, as described in Massachusetts, an accessory offense. M.G.L. c. 274 552, 4. See, Commonwealth v. Perry, 357 Mass. 149, 152 (1970) (mere knowledge that a crime is about to take place does not make one quilty as an accessory). We do not, of course, decide this issue; Commonwealth v. Mangula, 322 N.E.2d 177 (Mass. App. 1975).

charge by a compentent tribunal (and, subsequently reinstated by the defendant) does not show malice or ill will when the defendant, in good faith, published the termination letter prior to the disposition of Marinelli's case before the East Boston District Court. When the letter was published, Allegheny had before it sufficient information upon which to conclude that Arsenault acted to aid or comfort another in the commission of a crime or in furtherance thereof. The fact that Arsenault probably committed no criminal offense at all is of little significance. What is of significance, however, is that Allegheny had reason to velieve that Arsenault deliberately acted to further a criminal act at the time the letter was prepared and published.

The record indicates that Allegheny made a thorough investigation prior to the publication. It establises that the Allegheny officials relied only on the evidence before it when it decided to prepare and publish the temination letter. Finally there is a notable absence of any evidence which tends to show that the defendant, through its agents, acted maliciously, recklessly, made unnecessary publications of the letter, or did not believe in the truthfulness of their comment. The

record makes it aboundantly clear that the Allegheny authorities, in good faith, believed that Arsenault acted improperly in making the disclosures to Marinelli. There is no evidence that the defendant made the remark because they "didn't like" th plaintiff or made unnecessary of unreasonable publications of the termination letter. See, Grindall v. First National Stores, 330 Mass. 557,559 (1953) (evidence that the store manager didn't like the plaintiff together with evidence that the store manager made the remark in a loud voice before store customers was sufficient evidence upon which a jury could find malice by the employer).

In light of the above, this case is appropriate for disposition by summary judgment. We recognize the policy that cases should be decided at a trial on the merits. But where the record is so complete, as it is in this case, with pre-trial affidavits, depositions and other documentary evidence from every critical witness, the Court has the complete factual setting which demonstrates that the defendant acted in good faith and that its comment, while perhaps not legally accurate, was fair. Viewing the record and the inferences which might be drawn therefrom in the light most favorable to the plaintiff, United

States v. Diebold, Inc., 369 U.S. 654, 655 (1962), the plaintiff has failed to show any evidence from which this Court could infer malice or ill will by the defendant's agents. The plaintiff knows now as much as he ever will about what was said and why it was said. All of the circumstances have been disclosed and all discovery has been available. Herbert v. Lando, 441 U.S. 153 (1979). No purpose will be served by prolonging this litication and submitting it to a trier of fact. The defendant is entitled to summary judgment.

SO ORDERED.

United States District Judge

APPENDIX B

Here is set forth, the opinion of the United States Court of Appeals for the First Circuit.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1232

ROGER ARSENAULT

Plaintiff-Appellant,

v.

ALLEGHENY AIRLINES, INC.

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICE COURT

FOR THE DISTRICT OF MASSACHUSETTS

A. David Mazzone, Judge

Before

Coffin, Chief Judge, and Campbell

AND Pell, * Circuit Judges.

Karl G. Spitzer, with whom Nicholas J. Descoulas, and Louis J. Muggeo were on brief, for appellant.

Daniel M. Crane, with whom Brackett B. Denniston, III, James B. Farmer, were on brief, for appellee.

December 24, 1980

*Of the Seventh Circuit sitting by designation.

Per Curiam. The plaintiff in this libel action appeals from the district court's grant of summary judgment to the defendant. Upon full consideration of the parties' positions as set forth in their briefs and at oral argument, and from an examination of the record, we find ourselves in agreement with the district court's disposition and opinion, and therefore we adopt it as our own with the following comments.

Given that defendant's publication of the libelous statement was conditionally privileged, the central question in this litigation is whether there were material fact questions presented admitting of answers that would defeat the privilege, and thus make summary judgment inappropriate.

The district court held that no such issues of material fact were raised. In seeking to overcome this decision, appellant argues that the district court misconceived the Massachusetts law insofar as it defines malice. Our short answer to this is that the district court properly stated the law, and, in particular, recognized that malice can in certain circumstances exist in the absence of "ill will in the conventional sense." The district court also correctly recognized that

if a publication is reasonably made, without malice, even though it contains false allegations, the privilege appies and a resulting libel action must fail. Burns v. Barry, 228 N.E. 2nd 728, 731 (Mass. 1967). This reasoning also applies even if the false allegation was the result of negligence. Petition of Retailer's Commercial Agency, 174 N.E. 2nd 376, 380 (Mass. 19610.

In this case, the appellant alleges that the defendant's characterization of appellant's conduct as "aiding and abetting" Marinelli's fraud, as opposed simply to "impeding the investigation" into the fraud, was beyond the protection of the conditional privilege. He contends here that material questions exist regarding exactly what assistance he rendered Marinelli. However, the fact that the defendant may have overstated appellant's conduct does not rise to the level of actionable libel overcoming the conditional privilege where, as here, the appellant has failed to make any showing that the overstatement was made in other than good faith, or that it was, at least, made in "reckless disregard to the rights of others." Summary allegations in the complaint are insufficient. Hahn v. Sargent, 523 F.2d 461, 464 (lst Cir. 1975, cert. denied, 425 U.S.

904 (1976). Furthermore, whether appellant actually aided Marinelli is immaterial because the defendant reasonably believed appellant had done so based upon the admissions of appellant and Marinelli made at the time of publication. The truth of the statements in the publication is irrelevant if the publication is conditionally privileged and the privilege is not abused and there is no showing of malice. Burns, supra. Because the appellant has failed to substantiate its summary allegations of abuse and malice here, the district court must be affirned. The appellant's remaining allegations were correctly treated in the district court's opinion.

AFFIRMED

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 80-1232.

ROGER ARSENAULT
Plaintiff, Appellant,
v.
ALLEGHENY AIRLINES, INC.,
Defendant, Appellee.

JUDGMENT
Entered December 24, 1980

This cause came on to be heard on appeal from the United States District Court for the Districe of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

_____
Clerk

(cc: Messrs. Spitzer and Crane.)

Office-Supreme Court, U.S.
FILED
JUN 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1849.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

ROGER ARSENAULT,
PETITIONER,

v.

ALLEGHENY AIRLINES, INC.,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

ALLAN VAN GESTEL,
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Question Presented.

Whether the grant of Respondent's motion for summary judgment in this defamation action was appropriate when the record consisted of pre-trial affidavits, depositions and other documentary evidence, and Petitioner failed to adduce any evidence regarding whether Respondent had abused its conditional privilege.

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No. 80-1849.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

ROGER ARSENAULT,
PETITIONER,

v.

ALLEGHENY AIRLINES, INC.,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent, Allegheny Airlines, Inc.,* respectfully opposes Petitioner Roger Arsenault's writ of certiorari to review the order and judgment of the United States Court of Appeals for the First Circuit entered on December 24, 1980.

Statement of the Case.

The Petitioner was an employee of the Respondent from approximately December, 1967 to August, 1976. In January, 1976, the Petitioner was found to have violated company and airline industry rules in misusing an employee pass for airline

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* Allegheny Airlines, Inc. was the corporate name of Respondent at the time this action was initiated; such name has since been changed to U.S. Air, Inc. Respondent has no parents, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

travel. As a result, he was placed on probationary status and became subject to immediate termination for any further violation of company rules.

During the summer of 1976, Respondent began an investigation, in cooperation with the Massachusetts State Police, into the misappropriation of company funds by airline ticket agents at Respondent's Logan International Airport operation in Boston. During the course of the investigation, Respondent learned that Petitioner had informed the principal suspect of the investigation that he was the target of an undercover operation being conducted by Respondent and the police. In subsequent questioning, both Petitioner and the suspect admitted to Respondent that Petitioner had informed the suspect of the investigation.

As a result of this information, Respondent determined that it would terminate Petitioner. In this connection, Petitioner's superiors examined the company's personnel policy guide and concluded that the most appropriate section governing Petitioner's conduct was that dealing with "aiding and abetting" another employee in the misappropriation of company funds. Accordingly, in August, 1976, a senior official of Respondent wrote to Petitioner stating that Petitioner was being terminated for aiding and abetting another employee in the misappropriation of company funds. This letter was circulated only to a limited number of employees within the company directly involved in personnel matters.

Thereafter, on December 12, 1976, the Petitioner initiated the present action in the United States District Court for Massachusetts, alleging the letter was defamatory. After extensive discovery, the District Court, per Judge Mazzone, granted Respondent's motion for summary judgment on March 17, 1980, finding that Respondent's statements were conditionally privileged, as remarks by an employer about an employee's work record, and that there was no evidence dem-

onstrating that Respondent had acted with ill will or malice or otherwise abused this privilege. The District Court further noted as follows:

> We recognize the policy that cases should be decided at a trial on the merits. But where the record is so complete, as it is in this case, with pre-trial affidavits, depositions and other documentary evidence from every critical witness, the Court has the complete factual setting which demonstrates that the defendant, while perhaps not legally accurate, was fair.

On December 24, 1980, the First Circuit Court of Appeals affirmed the judgment of the District Court.

Argument.

1. PETITIONER'S TIME FOR FILING HIS WRIT OF CERTIORARI EXPIRED PRIOR TO RECEIPT OF PETITIONER'S WRIT BY THE COURT.

Petitioner originally filed his writ of certiorari with the Court on March 23, 1981, one day prior to the expiration of the time prescribed by the Court's rules for so doing. The Petitioner's initial filing was rejected as not being in conformance with applicable rules as to form, and Petitioner was allotted an additional twenty days to comply with the rules. However, Petitioner's second filing was also rejected for similar reasons. Finally, on May 4, 1981, Petitioner filed the instant writ of certiorari, at last in proper form but well after the twenty day leave period he had been allotted had expired. No leave to file late was requested, nor has such leave been granted. Thus, Petitioner's writ here is untimely and should be denied on that ground.

2. THIS DEFAMATION CASE INVOLVES A COMMONPLACE ISSUE REGARDING THE GRANT OF SUMMARY JUDGMENT, WHERE PETITIONER PRODUCED NO EVIDENCE TO OVERCOME A CONDITIONAL PRIVILEGE, AND THERE ARE THEREFORE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING PETITIONER'S WRIT OF CERTIORARI.

Rule 17 of this Court sets forth the several factors or considerations relevant to a decision whether to grant review on a writ of certiorari. None of these considerations are present in the instant action. There is no conflict among appellate courts. And this case does not present an "important question of federal law which has not been, but should be, settled by this Court. . . ." Rather, what is presented to this Court for review is a familiar and uncontroversial issue—the appropriateness of summary judgment in a defamation action when a privilege has been asserted—which neither requires nor deserves the attention of this Court. See, e.g., *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Hahn* v. *Sargent*, 523 F. 2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

Petitioner's central contention is that certiorari is appropriate because the lower courts wrongfully relied on affidavits of Respondent's officials in finding an absence of the ill will or malice essential to overcome the privilege accorded to the Respondent's notification letter. This contention, however, misses the simple import of the opinions of both the District Court and the Court of Appeals—that Petitioner had failed to discharge his burden to produce *any* evidence which would give rise to an inference that the conditional privilege accorded the letter had been lost. The District Court put it this way:

> Viewing the record and the inferences which might be drawn therefrom in the light most favorable to the plain-

> tiff, the plaintiff has failed to show any evidence from which this court could infer malice or ill will by the defendant's agents [citation omitted].

The Court of Appeals agreed, finding that Petitioner had "failed to substantiate its summary allegations of abuse and malice" and "failed to make any showing that the overstatement was made in other than good faith, or that it was, at least, made 'in reckless disregard of others.' "

Petitioner would have this Court believe that the District Court and the Court of Appeals have adopted an unrestricted policy of granting summary judgment in cases of this sort simply on the basis of affidavits submitted by interested parties. While affidavits were submitted in support of its motion for summary judgment, the District Court correctly observed that the record before it also consisted of numerous depositions and other documentary evidence. Petitioner's contention that the court below relied primarily on the basis of affidavits submitted by Respondent's employees distorts and recasts the basis of the District Court's decision to grant summary judgment. The Respondent's motion for summary judgment was granted in the context of a complete factual record, a record to which Petitioner was unable to add any evidence of malice or ill will.

The case presented for review to this Court is thus legally simple and unexceptional. The Respondent established the existence of a conditional privilege which the Petitioner was unable to defeat by production of evidence demonstrating an abuse of the privilege. When a plaintiff cannot, as here, produce *any evidence* from which a court can infer malice or ill will, summary judgment is plainly appropriate. *First National Bank of Arizona* v. *Cities Service Co., supra,* 391 U.S. at 289; *Hahn* v. *Sargent, supra,* 523 F. 2d at 464; *John Anderson & Co. (Wool) Pty.* v. *Ludlow Jute Co.,* 569 F. 2d 696, 698 (1st Cir. 1978); *Briggs* v. *Kerrigan,* 431 F. 2d 967,

968 (1st Cir. 1970); *Boston Mutual Life Ins. Co.* v. *Varone*, 303 F. 2d 155, 161 (1st Cir. 1962); *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005, 1010 (M.D. Fla. 1969); *Levesque* v. *Kings County Lafayette Trust Co.*, 293 F. Supp. 1010, 1013 (E.D. N.Y. 1968). A commonplace case of this sort, involving the application of accepted legal principles to a factual record, does not qualify for review under the standards set forth in this Court's rules and is undeserving of further judicial review.

Conclusion.

For the reasons set forth above, a writ of certiorari should be denied.

Respectfully submitted,

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